(10)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 896

TEXAS LAND AND MORTGAGE COMPANY, LIMITED,

Petitioner,

vs.

LON ALEXANDER MULLICAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

E. L. KLETT,
CHARLES L. BLACK,
Counsel for Petitioner.

INDEX.

Subject Index.

Table of Statutes Cited.

Table of Cases Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 896

TEXAS LAND AND MORTGAGE COMPANY, LIMITED,

Petitioner,

vs.

LON ALEXANDER MULLICAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May it please the Court:

Petitioner, Texas Land and Mortgage Company, Limited, respectfully shows to this Honorable Court:

A.

Summary Statement of Matter Involved.

Texas Land and Mortgage Company, Limited, a British Corporation, petitions this Court to issue its writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review and reverse its decision, holding

contrary to settled Texas law, that a contract made in Texas to pay compensation for use of money for 10 years is usurious and void, where the compensation "chargeable" for only "*several of the years in question*" exceeds the maximum legal rate of 10 per cent per annum, even though the total compensation payable for the *entire 10 year term* that debtor uses, and under the contract is entitled to use, the money is less than 10 per cent per annum for such 10-year term.

In 1935, Respondent, L. A. Mullican, was debtor in a Frazier-Lemke bankruptcy proceeding, and obtained from the Referee an order extending for four years the time for payment of an unpaid balance of $26,495.00 that he stated in his schedule, under oath, he owed Petitioner (R. 5).

Petitioner filed verified proof of claim, covering unpaid balance of principal, interest and attorney's fees, in the amount of $38,829.76 (R. 17).

Thereupon debtor was granted four years in which to pay said debt (R. 36-37).

After debtor had received the benefit of the four year extension, he then asked the Referee to find that the contract to pay interest was usurious and void, and to credit all payments of interest upon principal (R. 44). This the Referee did, and declared the entire debt discharged because the interest payments made during the twenty years debtor used the money exceeded the principal. Accordingly, Petitioner's claim was completely disallowed (R. 91).

Upon a petition for review, the District Court sustained the Referee, and entered judgment discharging the debt (R. 171-172). An appeal by Petitioner to the United States Circuit Court of Appeals for the Fifth Circuit resulted in an affirmance (R. 269). The Circuit Court of Appeals made the erroneous ruling now complained of in overruling Petitioner's specifications of error, to the effect that the con-

tract was not usurious and that the District Court erred in holding that it was usurious because the tax rate plus the interest rate exceeded 10 per cent for only a part of the period borrower was entitled to use the money (R. 262); and in overruling the same contention in Petitioner's Petition for Rehearing (Grounds II and III, R. 271).

The undisputed evidence shows, and the lower courts found, that on December 22, 1922, Respondent borrowed from Petitioner $38,000.00, which he promised to pay to Petitioner 10 years after date, with interest at the rate of 8 per cent per annum, as evidenced by promissory notes executed in Texas and secured by mortgage upon Texas real estate (R. 16, 164). The maximum legal rate of interest in Texas is 10 per cent per annum. The mortgage also obligated debtor to pay, before becoming delinquent, all annual taxes "chargeable" against the notes (R. 165). Although no taxes were ever assessed against the notes or paid by the debtor, nevertheless such "potential" or supposititious "taxes" are deemed a part of the interest "burden", and the amount of tax "chargeable" (although not assessed or collected) each year must be calculated to ascertain the contract interest rate. In the present case such "potential" tax is included as part of the contract interest rate.

The "Agreed Statement of Facts (R. 174-175), upon which the case was tried, sets forth a table showing, by mathematical calculation the correctness of which is not disputed, that the annual 8 per cent interest rate, when added to the "chargeable" or so-called "potential" tax rate, computed for each of the years 1922 to 1932, is less than 10 per cent per annum for the entire 10-year term (R. 174-175).

Upon such agreed facts, the Circuit Court of Appeals held, as did the District Court, that because "the total burden of stipulated interest plus taxes exceeded the 10 per cent maxi-

mum allowed by Texas law during *"five years of the loan period"*, the Respondent *"fully discharged the burden of showing that the contract was usurious under the Texas statute as construed by the Courts of that state"* (132 F. (2d) 242), even though there was no proof that such "total burden" amounted to 10 per cent per annum for the *entire* 10-year period or term debtor used and was entitled to use the money; and even though it expressly appeared that the interest rate calculated for the entire term of ten years was less than 10 per cent per annum.

The holding of the Circuit Court of Appeals on this important question of local law is in clear conflict with applicable local decisions. The settled law of Texas is that the question of usury must be determined by considering the entire interest burden exacted for the entire term of the loan and by dividing the total interest burden by the number of years in the term. Thus the "per annum" *rate* is determined. Before the creditor's contract can be condemned as usurious, it must appear that he has exacted interest at a rate of more than 10 per cent per annum for the entire term or length of time that the debtor is entitled to withhold the money under the contract. The constitutional and statutory provisions governing the subject of usury control the *rate* of interest that may be charged but not the manner or time of paying interest. The parties are free to fix the manner of paying interest in any way they may choose so long as the total interest charged for the entire term does not exceed 10 per cent per annum for that term. The leading Texas cases so holding are:

Mills v. *Johnston*, 23 Texas 308;
Norris v. *Belcher Land Co.*, 98 Tex. 176, 82 S. W. 500;
Investment Co. v. *Grymes*, 94 Tex. 609, 63 S. W. 860;
Nevels v. *Harris*, 129 Tex. 193, 102 S. W. (2d) 1046;

Shropshire v. *Commerce Farm Credit Co.*, 120 Tex. 400, 30 S. W. (2d) 285.

For a further statement as to the rulings made in these cases and in other Texas cases, see heading "Reason Relied on for the Allowance of the Writ, *post*, pp. 8-16.

B.

Basis Upon Which It Is Contended That This Court Has Jurisdiction.

1. The jurisdiction of this Court is invoked under U. S. C. A., Title 28, Sec. 347(a); Judicial Code, Sec. 240, as amended by the Act of February 13, 1925.

2. The date of the judgment of the Circuit Court of Appeals for the Fifth Circuit to be reviewed is December 14, 1942. The opinion of the Court is reported in 132 F. (2d) 241.

A Petition for Rehearing was filed by Petitioner on January 4, 1943 (R. 270), and was entertained and denied on January 11, 1943 (R. 284).

Said petition duly complained of the ruling herein complained of (Grounds II and III, R. 271).

3. As elsewhere pointed out, the Circuit Court of Appeals has decided an important question of local law in a way that is in clear conflict with applicable local decisions, as is specifically shown in subdivisions A and D hereof. Therefore, this Court should entertain jurisdiction under Rule 38, sub. 5(b).

4. It is believed that the following cases sustain the jurisdiction of this Court:

Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208;
Griffin v. *McCoach*, 313 U. S. 498, 504.

C.

Question Presented.

The question presented is whether the Circuit Court of Appeals erred in holding the notes involved to be usurious and void because the compensation "chargeable" (the stipulated interest rate plus the so-called tax rate), for "several of the years in question", exceeded the maximum legal rate of 10 per cent interest per annum, although it appeared from the undisputed evidence and by simple mathematical calculation, that the total compensation or interest "chargeable" (stipulated interest plus the so-called tax rate), for the entire 10-year term of the loan, amounted to less than 10 per cent per annum.

Under the settled Texas rule, the question of usury is determined upon a consideration of three factors: (a) the amount of money borrowed by the debtor; (b) the term that he is entitled to use this money under the contract; and (c) the total compensation (interest) exacted for its use. This total compensation must be averaged over the whole term to determine whether the interest exacted for that term exceeds 10 per cent per annum.

D.

Reasons Relied On for the Allowance of the Writ.

This Court should grant the writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit because that Court "has decided an important question of local law in a way probably in conflict with applicable local decisions." Rule 38, Sec. 5(b).

The earliest Texas case discussing the question of usury here presented is *Mills* v. *Johnston*, 23 Texas 309, decided in 1859. At that time the maximum interest rate in Texas was 12 per cent. It appeared without dispute that the

lender had actually charged 12½ per cent during one year of the loan but that the aggregate amount of interest, averaged for the whole term, was less than 12 per cent. The Court held that the contract was not usurious. We quote from the opinion:

> "The law, in deciding whether a settlement involves usury or not, will look to the whole amount of interest reserved, as distinct from such commissions as are allowable and recoverable by law, and to the whole period of forbearance extended; and if the charges, properly imputable to interest, do not exceed the highest interest allowed by law, for the whole period of forbearance, then the settlement cannot be held to be usurious.
>
> "In applying these principles to the settlement before us, we find that the whole amount of interest reserved * * * does not amount to twelve per cent per annum, upon the sums due, for the whole period of forbearance extended."

The applicable test of usury in such a case was thus stated by the Supreme Court of Texas in *Investment Company* v. *Grymes*, 94 Tex. 609:

> "The question presented is, did the parties embrace in the 120 notes for the use of the principal debt a sum greater than the original debt would produce at ten per cent per annum for the time the payor of the note had the use of the money?"

The 120 notes referred to were interest notes and the question presented, as stated by the Court, was whether they included a sum of money greater than the original debt would produce at 10 per cent "per annum for the time the payor of the note had the use of the money." The test as thus stated was quoted and expressly approved in a leading Texas case, *Shropshire* v. *Commerce Farm Credit Co.*, 120 Tex. 400, 409; 30 S. W. (2d) 282, 285.

In *Nevels* v. *Harris*, 129 Tex. 190, 102 S. W. (2d) 1046, the nominal principal of the loan was $6400.00. The stipulated interest was 8 per cent. But the creditor withheld $320.00 of the principal as a "commission." The Texas Supreme Court held that the actual amount of the loan was only $6080.00 and that the $320.00 called a commission would be treated "as interest charged on the loan of $6080.00". This interest (called commission), having been collected in advance, the debtor claimed that the contract was usurious because, when the $320.00 was added to the 8 per cent stipulated interest, the amount of interest for the first year exceeded 10 per cent. The Court overruled those contentions and held that the $320.00 should be averaged over the entire term of the loan—five years—and that, thus averaged, the interest for the entire term was less than 10 per cent. The following is quoted from the opinion:

> "Of course, we will treat the $320 as interest charged on the loan of $6080.00. At 10 per cent., the highest legal rate, the interest on $6080.00 for one year would be $608.00, and 10 per cent. interest for the five-year period the loan was to run would amount to $3040.00. This sum added to the principal actually loaned, $6080.00, would aggregate $9120.00. This last sum is the maximum amount Stolley could have legally charged, and unless the contract calls for the payment of more than that sum it is not usurious. Adleson *v.* Dittmar Co., supra; Eubanks *v.* Simpson (Civ. App., writ refused) 90 S. W. (2d) 291; Galveston & Houston Inv. Co. *v.* Grymes, 94 Texas 609, 63 S. W. 860, 64 S. W. 778. It is settled by the above authorities that the law limits the amount that may be charged and received for the use and detention of money to not exceeding 10 per cent. per annum on the amount of the contract, and that, 'If the contract for the use and detention of the principal debt is not a sum greater than such debt would produce at 10 per cent. per annum from the time

the borrower had the use of the money until it is repaid it is not usurious.' Adleson *v.* Dittmar Co., supra; Eubanks *v.* Simpson, supra. If we consider this a contract for five years, we, under the same, would have the sum of $6400.00 bearing 8 per cent. interest per annum, or $512.00 interest for each of the five years; or a total of $2560.00 interest. This total interest sum added to the $6400.00 would produce $8960.00. This would be $160.00 less than could have been legally charged for the sum of $6080.00 actually loaned. It follows that considered as a five-year contract the retention of the $320.00 did not render it usurious." (129 Tex. 196; 102 S. W. 2nd 1049).

In *Norris* v. *Belcher Land Mortgage Company*, 98 Tex. 176, 82 S. W. 500, the contract provided for the payment of 11 per cent interest at the end of each of the first three years and 6 per cent interest at the end of the fourth and fifth years. The Court held that this made the interest so stipulated amount to only 9 per cent for the entire term of five years, this rate being arrived at by totaling all the interest charges for the five years and dividing that total by five. Accordingly, the Court held that the stipulated interest was not usurious and remanded the case for another trial on the issue as to whether the contract was usurious because of the presence of a "tax clause."

In *Eubanks* v. *Simpson*, 90 S. W. (2d) 291, cited with approval by the State Supreme Court in *Nevels* v. *Harris*, *supra*, a "commission" withheld by the creditor at the time the loan was made was treated as interest. It was further held that the contract was not usurious because, when the commission was spread over the entire term of the loan (10 years), the total interest was less than 10 per cent per annum for the stipulated term. The Court in its opinion said:

" 'If the contract for the use and detention of the principal debt is not a sum greater than such debt

would produce at 10 per cent. per annum from the time the borrower had the use of the money until it is repaid, it is not usurious. Galveston & H. Inv. Co. v. Grymes, 94 Tex. 609, 63 S. W. 860, 64 S. W. 778.' Southern States Mort. Co. v. Lykes (Tex. Civ. App.) 85 S. W. (2d) 780, 783, writ ref.

"To discuss this case further is merely to rethrash old straws."

The same rule is applied where the question of usury is resolved in favor of the debtor. *Adleson* v. *Dittmar Co.*, 124 Tex. 564, 80 S. W. (2d) 939, was a suit brought under the Texas statute to recover penalties for double the amount of interest paid on a usurious note. The term of the loan was five years. The contract rate was 9.48 per cent per annum—less than the Texas maximum. But the creditor withheld a so-called "commission", which was, in fact, interest and treated by the Texas court as such. The penalty statute limits the collection of penalties to the interest payments made within two years next preceding the filing of the suit. The Court of Civil Appeals held that the commission, having been withheld in advance, should all be charged as interest collected for the first year of the term and, on that theory, further held that no usurious interest was collected during the two years next preceding the filing of the suit and that debtor was not entitled to recover. The Supreme Court reversed that ruling and held that the so-called commission was interest for the entire term, and that when spread over the entire term the interest contracted for exceeded 10 per cent per annum for that term and that, accordingly, the debtor was entitled to recover statutory penalties on account of the interest paid during the two years next preceding the filing of the suit.

The instant case is to be distinguished from numerous Texas cases where a second mortgage was given to secure

the payment of additional interest notes computed over the whole period or term and containing an "acceleration clause" entitling the creditor, upon certain contingencies, to shorten the term and thereby to create a new term and to collect all of the stipulated interest for the use of the money during the new and shortened term, and without a "saving clause" or provision for abatement of interest because of the shortening of the term. *Shropshire* v. *Commerce Farm Credit Company*, 120 Tex. 400, was such a case, and there are later cases following that case. The decisions referred to hold that the acceleration clause renders the contract usurious by placing it in the power of the creditor to shorten the term and to collect excessive interest for the new and shortened term.

In these acceleration clause cases the question of usury is still determined upon a consideration of the entire term the debtor is entitled to use the money; that term being, however, the new and shorter term that the creditor is entitled to create by resort to the acceleration clause. *Shropshire* v. *Commerce Farm Credit Co.*, 120 Tex. 400, 409-410; 30 S. W. (2d) 282, 285. In these cases the usury is found in the fact that the creditor is entitled to collect for the new and shorter term the interest that was stipulated for the original and longer term; or, as stated by the Supreme Court of Texas in the Shropshire case, the manner of payment contracted for "imposes upon the payor *a charge for more time than he had the money.*" (Italics by the Court.)

The "acceleration clause" rule is not invoked or relied upon in this case, and neither the decision of the District Court nor that of the Circuit Court of Appeals was based thereon.

The design of the law is to protect the debtor against an excessive interest charge for the whole term—the actual term as fixed by the contract the parties elected to make—

and not merely for one year, or any other term less than the entire term.

The words "per annum" used in connection with the rate—"ten per cent per annum"—afford only a measure to be applied in calculating the interest charge to be exacted during the term of the loan. The term may be one year or fifty years. The language "ten per cent per annum" does not mean that a loan contract for ten years shall be divided into ten separate years; it does not mean that the interest collected on a 10-year loan shall not exceed 10 per cent during a single year. It means only that the interest exacted during the term of the particular contract, whatever that term may be, and however the interest charge may be paid, shall be no more than 10 per centum per annum for the contract term.

Under the holding of the Circuit Court of Appeals in this case, if a debtor should borrow $1000.00 for ten years, with interest at 8 per cent per annum (the interest for the entire term totaling $800.00), and should promise to pay the interest as follows: $400.00 at the end of the ninth year and $400.00 at the end of the tenth year, then the contract would be usurious, because, under the holding here complained of, the debtor would be promising to pay more than 10 per cent at the end of two of the years of the entire term, although the interest rate for the entire term would be greatly less than 10 per cent. Under that holding, a 10-year contract would be usurious if the creditor was required to pay 11 per cent at the end of the first year and no interest at the end of any other year.

This holding is in conflict with the settled law of Texas as evidenced by the Texas cases before referred to.* No

---

* The Court that decided the instant case did not include any Judge from Texas. The Court was composed of Circuit Judges Holmes from Mississippi and McCord from Alabama, and District Judge Dawkins from Louisiana.

argument is needed to demonstrate that the question decided was an important one of local law.

As before pointed out, this controversy originated as a bankruptcy proceeding filed by the respondent Mullican. It is plain that if the case had been filed and tried in a State court, the settled State rule of decision would have been applied to the facts, with the result that the contract in question would have been upheld as against the charge of usury.

Petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket 10,344, Texas Land and Mortgage Company, Limited, Appellant, v. Lon Alexander Mullican, Debtor, Appellee, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed and this petitioner may have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

TEXAS LAND AND MORTGAGE COMPANY, LIMITED
By E. L. KLETT,
CHARLES L. BLACK,
Counsel for Petitioner.

(5480)

No. 896

Supreme Court of the United States

October Term, 1942

TEXAS LAND AND MORTGAGE COMPANY, LIMITED
Petitioner,

vs.

LON ALEXANDER MULLICAN, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(C. C. CRENSHAW) and
W. W. CAMPBELL, Lubbock, Texas
Attorneys for Respondent,
Lon Alexander Mullican.

VICKERS & CAMPBELL
Lubbock, Texas
Of Counsel for Respondent.

E. Duncan & Co., Brief Printers, Dallas

SUBJECT INDEX

INDEX OF AUTHORITIES

No. 896

Supreme Court of the United States

October Term, 1942

TEXAS LAND AND MORTGAGE COMPANY, LIMITED
Petitioner,

vs.

LON ALEXANDER MULLICAN, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The loan contract in question required Respondent to repay the $38,000 in ten years with eight per cent per annum interest thereon, payable annually as it accrued, and in addition to pay all taxes annually assessed against said notes, and expressly stipulated for the lender to accelerate and mature the notes if the debtor failed to pay such interest and taxes as they accrued. (R. 26-27).

The Circuit Court of Appeals in this case found that

> "The total burden of stipulated interest plus taxes exceeded the 10% per annum maximum allowed by Texas law during five years of the loan period." (R. 268).

Based on such finding it held:

> "The contract was usurious under the Texas Statute construed by the courts of that state." (R. 268); 132 Fed. 2d. 242).

It in all things affirmed the judgment of the District Judge who had confirmed the Referee's judgment disallowing all interest on the claim of Petitioner. Of course the Referee, and the District Judge on Petition to Review, found the facts as quoted above and adjudged the loan contract usurious (R. 87-95; 164-172).

Mandate issued and went down to the Trial Court February 4th, 1943 "for such execution and further proceedings" to be had according to "right and justice." See Exhibit A, certified copy of Mandate hereto annexed. Such further proceedings was under Section 74 of the Bankruptcy Act and not under the Frazier-Lempke Act. (R. 3) In obedience to said Mandate the Trial Court had a hearing on February 10th, 1943, and rendered final judgment closing the Bankruptcy proceedings and returned to Respondent all property which included the real estate that was mortgaged to the Petitioner as security for its alleged debt. (See exhibit B, certified copy of final Judgment in No. 342 in Bankruptcy). All costs have been paid and the final judgment sought to be reviewed in this case has in all things been executed. id.

REASONS WHY THIS COURT'S JURISDICTION SHOULD NOT BE EXERCISED TO GIVE PETITIONER "ANOTHER HEARING" ON WHETHER THE LOAN CONTRACT WAS USURIOUS

1.

A contract for repayment of the money loaned providing for the debtor to pay more than ten per cent per annum interest for one or more years of the loan period is usurious under Texas law.

2.

This Court's jurisdiction should not be exercised to grant Certiorari to review a Judgment of the Circuit Court whose Mandate has gone down to the Trial Court and final Judgment rendered in obedience thereto without any stay sought by Petitioner.

ARGUMENT AND AUTHORITIES IN SUPPORT OF FIRST REASON

The Circuit Court's holding that the loan contract in question is usurious under Texas law is the settled law in Texas.

Article 16, Section 11, Texas Constitution;

Article 5071 R. S. of Texas;

Shropshire v. Commerce Farm Credit Co. 280 S.W. 181 (Com. of App.);

Shropshire v. Commerce Farm Credit Co. 30 S. W. 2d. 285 (Sup. Ct.);

Shropshire v. Commerce Farm Credit Co. 39 S. W. 2d. 11 (Sup. Ct.);

Commerce Trust Co. v. Ramp 116 S.W. 2d. 144 (Civ. App.);

Commerce Trust Co. v. Ramp 138 S.W. 2d. 533 (Sup. Ct.);

Dallas Trust and Savings Bank v. Brashear 39 S.W. 2d. 148 (Civ. App.);

Dallas Trust and Savings Bank v. Brashear 65 S.W. 2d. 288;

Texas Land & Mortgage Co. Ltd. v. Mullican 132 Fed. 2d, 242 and the authorities therein cited. (R. 268).

The foregoing authorities directly hold that a written loan contract requiring the debtor to pay interest in excess of ten per cent per annum for one or more years of the loan period is usurious even though the total interest to be paid does not exceed ten per cent if calculated for the entire period of the loan. In the Ramp case, supra, our Texas Court of Civil Appeals had for determination a loan contract requiring the debtor to pay interest on a loan of $50,000 in excess of ten per cent per annum for each of the first four years of the ten year period and six and one-half per cent per annum for the remaining years. The total interest to be paid if spread over the entire period would be nine per cent. By reason of the exaction of more than ten per cent for each of

the first four years it was condemned as usurious in this language:

> "This arrangement unquestionably made the contract usurious. . . . it is plainly expressed in the obligatory portion of the contract. Such contracts must be determined by the statutory limitation of ten per cent for the use of the borrowed money for a term of one year. If the interest contracted to be paid exceeds that rate, the contract is usurious and the rule under which the courts must give to the contract a construction that will make it legal, if it be fairly susceptible of such construction, does not justify them in ignoring the very terms that have been adopted by the parties and which make the contract illegal under the provisions of the statute." (Gyrmes, 63 S.W. 860. Shropshire Cases, 30 S.W. 2d. 282, 39 S.W. 2d. 11.)

Our Supreme Court reviewed the holding on a Writ of Error and in all things affirmed the Court of Civil Appeals in this language:

> "his holding was based on the ground that the additional two and one-half per cent interest on the principal of the loan was "squeezed" into four annual payments of $3125.00 each, instead of being spread over the ten year period of the loan, and this resulted in making the rate for the first four years in excess of ten per cent per annum. This holding of the Court of Civil Appeals is so obviously correct that it becomes unnecessary to discuss the question." (138 S.W. 2d. 533)

In the Shropshire case, supra, our Commission of Appeals had before it a loan contract requiring the debtor to

pay on a loan of $5,000 interest in excess of ten per cent for each of the first five years of the loan period and six per cent for the remaining years. The court held the loan contract usurious in this language:

> "The interest contract, embodied in the notes, etc., require a payment of $504, at the end of each of the first 5 years, a total of $2,520, which is the equivalent of 12 per centum per annum, and a payment of $252 at the end of each of the last 5 years, a total of $1,260, the equivalent of 6 per centum per annum. The maximum rate prescribed by the Constitution, chap. 11, art. 16 and the statute (Article 5071, R. S. 1925), being 10 per centum, per annum the exactions thus provided for are usurious, at all events prima facie, and, we believe, absolutely. * * *
>
> "The lawful maximum of 10 per centum per annum is exceeded when the contract requires payment of 12 per centum for any year of the term. Two elements enter into the standard of measurement, viz. a year (per annum) as the unit of time and 10 per centum of the principal borrowed as the amount for that period. The terms employed in the Constitution and Statute are plain, and, while cases may be found to support a contention against the position here taken, we believe they are not subject to a meaning different from that above given."

Our Supreme Court expressly affirmed the holding of the Commission of Appeals in two written opinions reported in 30 S.W. 2d, 285 and 39 S.W. 2d 11.

Soon after the Shropshire cases were decided our Texas Court of Civil Appeals had the same question for deter-

mination. Dallas Trust and Savings Bank v. Brashear, 38 S.W. 2d, 148. An excess over ten per cent interest was required to be paid for each of the first five years of the loan period and six per cent for the remaining years. If the interest was spread over the ten year term of the loan it would not equal ten per cent. In other words the total interest to be paid lacked the sum of $386.67 to equal ten per cent interest. The Supreme Court reviewed said case and affirmed the holding of the Court of Civil Appeals holding the loan contract usurious. Here is what the Court had to say on this question:

> "The contract is usurious on its face or in its incipiency because it exacts of the borrower more than 10 per cent per annum for each of the first five years of the loan, and, of course, exacts a total payment of interest in excess of 10 per cent per annum for the first five years of the loan contract. An analysis of the loan contract and the various payments exacted by it of the borrower condemns it in its incipiency as an usurious one. It is true as contended by appellants that for the remaining five years of the loan contract there will be collected only seven per cent interest per annum on $2,400, or $168 annually, a total of $840, which if added to the $1,479.33 interest collected for the first five years would make a total sum of $2,319.33, or about 9 per cent for the entire period of the loan contract. But the vice in the contract as written is the fact that it exacts more than 10 per cent per annum for each of the first five years of the loan.
>
> "Article 16, chap. 11, of the state Constitution, and Articles 4979 and 4980, R.S., enacted pursuant

> to the constitutional provision, declare all contracts whatsoever which may in any way, directly or indirectly, stipulate for a greater rate of interest than 10 per cent per annum to be void to the amount or value of the interest.
>
> "The Supreme Court held in Galveston & H. Investment Co. v. Grymes, 94 Tex. 609, 63 S.W. 860, 64 S.W. 778, that, to determine the question of usury in a contract, it must be tried by the statutory limitation of 10 per cent per annum for the use, forbearance, or detention of the money for one year."

The foregoing holdings of our Texas Courts on the question are the last expressions of said court, holding that

> "The lawful maximum of 10 per cent per annum is exceeded when the contract requires payment of interest in excess of 10 per cent per annum for any year of the term."

The Circuit Court of Appeals, Fifth Circuit, recognized this to be the Texas law in Atwood v. Deming, 55 Fed. 2nd. 180 and Cole v. Franklin Life Insurance Company, 108 Fed. 2nd. 130, 132. The Texas Constitution and Statute on usury were considered and construed in each of the foregoing cases cited and certainly it is the settled law in Texas that the contract in question is usurious. (See Appendix 1 and 2 for the Constitution and Statute.)

The Nevels-Harris case, 102 S.W. 2d, 1046, cited at pages 4 and 8 of the Petition for Certiorari has no application and certainly does not hold contrary to the fore-

going decisions we have quoted. In said case the $320 was never paid. The Court says so. The court said that more than ten per cent per annum was never actually paid or collected and it further found that the contract did not require the debtor to pay interest in excess of ten per cent for any year of the loan period; that the language of the loan contract forbid the lender to collect more than ten per cent for any year of the loan period and likewise did it forbid any interest in excess of ten per cent for the entire period of the loan. The Court pointed out two savings clauses in the contract to save it from being adjudged usurious and then to cinch the matter in the last paragraph of its opinion the court said:

> "Of course we do not mean to hold that a person may exact from a borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done."

The same can be said of the Simpson-Eubanks case cited by Petitioner at page 9 of its Petition. In said case the contract did not provide for payment of interest in any one year of the loan contract in excess of ten per cent. It is to be noted that in the case at bar Petitioner had no saving clause in its contract to save it from usury, but it did have an acceleration clause, referred to on page 1 of this Brief (R.26). According to Petitioner's argument the loan in question of $28,000 could be made for

a period of ten years beginning December 2nd, 1922, and due December 2nd, 1932, with interest at the rate of ten per cent per annum and for all of the interest for the ten year period, amounting to $38,000 to be due December 2nd, 1923, one year after its date. Thus debtor would borrow $38,000 on December 2nd, 1922, pay the entire interest one year later, on December 2nd, 1923, or $38,000 and still owe the lender $38,000 principal on December 2nd, 1932. Certainly such a loan contract is usurious under Texas law, contrary to the argument made by Petitioner at page 12 of its Petition. To hold otherwise would be to substitute fiction for fact. It would nullify our Constitution and Statute against usury.

In the case at bar the contract required Respondent Mullican to pay interest in excess of ten per cent per annum "during five years of the loan period," and such contract is certainly usurious under Texas law.

In a footnote, page 12 of the Petition, it is asserted that the Court who decided this case did not include any Judge from Texas. The implication is that the Justices were not qualified to interpret and apply the Texas usury law to the facts in this case. We reply to the assertion:

1. Justice Hutcheson is a member of the Court, a resident and native Texan, licensed to practice law by the Texas authorities more than thirty years ago and the Court records will reflect that he actively practiced his profession with some degree of success at Houston, Texas, until he was appointed and qualified as a member of the United States Circuit Court of Appeals, Fifth Cir-

cuit, some eighteen years ago. He delivered the opinion of the Court January 13th, 1932, in the case of Atwood v. Deming Investment Company, 55 Fed. 2d. 180. It involved the Texas usury law and in particular whether the loan contract was usurious in requiring the debtor to pay more than ten per cent per annum interest for one or more years of the loan period. He held the contract usurious and cited as his authority for such holding the Shropshire cases, supra among others. Later, on December 13th, 1939, he delivered the opinion of the Court in the case of Cole v. Franklin Life Insurance Company, 108 Fed. 2d. 130, and said case involved the usury law of the State of Texas and in particular did it involve usury like it is in the case at bar where the contract required the debtor to pay the taxes on the note in addition to the stipulated interest. He again discussed the Shropshire cases, supra, and applied the Texas usury law as did Justice McCord who delivered the opinion in the case at bar. Surely Justice Hutcheson was qualified to so interpret and apply the Texas usury law to the case at bar. He being a member of the Court we infer he in all things adopted the Court's opinion as the settled law in Texas on the question of law involved. In any event the three Justices who delivered the opinion likely conferred with him about the question before delivery thereof.

2. Judge Davidson was the District Judge who reviewed the Referee's decision and proceedings, holding the contract usurious in the case at bar. He is a native Texan and lawyer of some repute, was qualified and li-

censed to practice under the laws of Texas more than thirty years ago, has actively engaged in the practice of law in Texas for more than thirty years and this with some degree of success. His opinion reflects some knowledge of the usury law and how to apply it (R. 164-171).

3. Justice W. D. Girand was the Referee who tried this case. He is likewise a Texas lawyer, licensed and qualified under the laws of Texas and has actively engaged in the practice for more than thirty years, and the Court records reflect that he has practiced with some degree of success. He adjudged the loan contract in question usurious (R. 87-95). We thus find complete harmony of the three Judges named in interpreting and applying the usury law of Texas to the loan contract in question, and all holding said contract usurious because "the lawful maximum of 10 per cent per annum is exceeded when the contract requires payment of interest in excess of 10 per cent per annum for any year of the term." The authorities cited, supra, directly so hold.

ARGUMENT IN SUPPORT OF REASON TWO

Petitioner did not ask the Circuit Court of Appeals to stay the Mandate in this case nor did it ask the Trial Court to do so when the latter received it and obeyed the same by having a final Hearing on February 10th, 1943, and rendered Judgment closing the estate and reinvesting title to the property in Respondent. The law

of estoppel should apply against Petitioner to invoke this Court's jurisdiction to review the case after the judgment has been fully executed. It was a party to the proceedings. The Trial Court thus performed its duty in obedience to the Mandate and Petitioner acquiesced therein without a Motion for stay of further proceedings to enable it to petition this Court for Certiorari. Said Court divested the title of the Trustee in Bankruptcy and reinvested same in Respondent. In such a situation a Petitioner should not invoke the exercise of this Court's jurisdiction to grant it a Petition for Certiorari on a Judgment that has been finally executed without any motion or prayer for a stay thereof to enable it to petition for such a writ.

Wherefore Respondent prays that the Writ be in all things denied or dismissed for want of Jurisdiction and in the alternative that the opinion and Judgment of the Circuit Court be in all things summarily affirmed.

C. C. Crenshaw

(C. C. CRENSHAW) and

W. W. Campbell

W. W. CAMPBELL, Lubbock, Texas
Attorneys for Respondent,
Lon Alexander Mullican.

VICKERS & CAMPBELL
Lubbock, Texas
Of Counsel for Respondent.

United States Circuit Court of Appeals

For the Fifth Circuit

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Honorable the Judge of the District Court of the United States for the Northern District of Texas, GREETING:

WHEREAS, lately in the District Court of the United States for the Northern District of Texas, before you, in a cause entitled:

"IN THE MATTER OF LON ALEXANDER MULLICAN, Debtor, and TEXAS LAND & MORTGAGE COMPANY, Limited, Creditor, No. 342 in Bankruptcy," the following Judgment was made and entered, to-wit:

> "The above cause came before this Court on a Petition to Review a Judgment of the Referee entered on November 10th, 1941, wherein the claim of the creditor, Texas Land & Mortgage Company, Ltd., after being re-examined and re-classified, was disallowed. The pleadings, the evidence and all proceedings before the Referee, together with the Petition to Review by the creditor and the reply thereto by the debtor, were submitted to the Court; also the attorneys for the respective parties submitted to the Court oral argument and written brief. The Court took all such proceedings under advisement and after considering same, reviewing all of the proceedings,

the Court is of the opinion that there was no error in the proceedings before the Referee and that the Judgment and Order of said Referee disallowing the claim of the creditor should be in all things sustained and his said Order in all things confirmed. The reasons for such opinion of this Court more fully appears in its opinion in this cause delivered April 10, 1942. It is Therefore Ordered, Adjudged and Decreed by the Court that the Judgment and Order of the Referee entered in this cause on November 10th, 1941, be in all things sustained and confirmed, to which judgment and ruling of the Court the Texas Land & Mortgage Company, Ltd., creditor, duly excepted, and said creditor gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

Entered this the 23rd day of April, 1942.

(Signed) T. WHITFIELD DAVIDSON,
Judge Presiding."

as by the inspection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Texas Land and Mortgage Company, Limited * * * agreeably to the Act of Congress, in such case made and provided, full and at large appears.

AND WHEREAS, in the present term of November in the year of our Lord one thousand nine hundred and Forty-two, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here Ordered, Adjudged and Decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is Further Ordered, Adjudged and Decreed that the appellant, Texas Land and Mortgage Company, Limited, and the surety on the appeal bond herein, Fidelity and Casualty Co., of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

December 14, 1942.

YOU, THEREFORE, ARE HEREBY COMMANDED that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal * * * notwithstanding.

WITNESS the Honorable Harlan Fiske Stone, Chief Justice of the United States the 4th day of February, in the year of our Lord one thousand nine hundred and forty-three.

(Signed) OAKLEY F. DODD,
Clerk, U. S. Circuit Court of
Appeals, for the Fifth Circuit.

(ENDORSED: No. 10344. United States Circuit Court of Appeals for the Fifth Circuit. November Term, 1942. Texas Land and Mortgage Company, Limited, Appellant, vs. Lon Alexander Mullican,

Debtor, Appellee. MANDATE. Filed 6 day of Feb. 1943. Geo. W. Parker, Clerk by Olive Fluke, Deputy.)

In Re:

LON ALEXANDER MULLICAN, NO. 342 IN BANKRUPTCY. Debtor.

On this the 10th day of February came on to be considered the above entitled cause, and it appearing that the debtor has complied with all the requirements of the court and that all debts of the debtor has been paid as provided in said extension agreement, and the mandate from the Circuit Court of Appeals in the case of the debtor vs. Texas Land & Mortgage Co., affirming the decision of the Court, having been filed, and that there is nothing further remaining to be done with reference to said estate.

It is Ordered that said estate be closed and that the debtor's property be returned to him and the control and jurisdiction of this Court over said property cease, all claims listed at the time of the filing of said petition having been fully paid and satisfied.

Done a Lubbock, Texas, this the 10th day of February, A. D. 1943.

(Signed) W. D. GIRAND,
Referee.

EXHIBIT B

District Court of the United States

OF AMERICA

Northern District of Texas

I, GEO. W. PARKER, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify the foregoing to be a true and correct copies of the Mandate of the United States Circuit Court of Appeals; and Final Order of Honorable W. D. Girand, Referee in Bankruptcy;

I further certify that all costs are paid in this cause. in cause No. 342 in Bankruptcy, entitled IN THE MATTER OF LON ALEXANDER MULLICAN, Debtor as fully as the same remains on file and of record in said cause, in my office at Lubbock, Texas.

IN WITNESS WHEREOF, I hereunto subscribe my name, and affix the seal of said Court, at my office in the city of Lubbock, Texas, in said District, this 13th day of April in the year of our Lord one thousand nine hundred and Forty-Three. and of American Independence the 166th year.

GEO. W. PARKER,
Clerk of said Court.
By OLIVE FLUKE,
Deputy.

APPENDIX I

CONSTITUTION, Art. 16, Sec. 11:

"All contracts for a greater rate of interest than ten per centum per annum, shall be deemed usurious, and the first Legislature after this amendment is adopted, shall provide appropriate pains and penalties to prevent the same; but when no rate of interest is agreed upon, the rate shall not exceed six per centum per annum."

APPENDIX II

R. S. STATUTES OF TEXAS, Art. 5071:

"The parties to any written contract may agree to and stipulate for any rate of interest not exceeding ten per cent per annum on the amount of the contract; and all written contracts whatsoever which may in any way, directly or indirectly, provide for a greater rate of interest shall be void and of no effect for the amount or value of the interest only; but the principal sum of money or value of the contract may be received and recovered."

(12)

Supreme Court of the United States

OCTOBER TERM, 1942

No. 896

TEXAS LAND AND MORTGAGE COMPANY, LIMITED, *Petitioner*,

vs.

LON ALEXANDER MULLICAN

PETITIONER'S REPLY BRIEF

E. L. KLETT,
CHARLES L. BLACK,
Counsel for Petitioner.

INDEX

SUBJECT INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 896

TEXAS LAND AND MORTGAGE COMPANY, LIMITED, *Petitioner*,

vs.

LON ALEXANDER MULLICAN

PETITIONER'S REPLY BRIEF

I.

Discussion of respondent's reliance on the "superseded" opinion in the Shropshire case.

Respondent correctly states that on February 10, 1926, the Texas Commission of Appeals, Section A, held in the case of *Shropshire v. Commerce Farm Credit Co.*, 280 S. W. 181 (on the original hearing of that case), that a promise to pay interest in excess of 10 per cent per annum for five years of a 10-

year term renders the loan contract usurious for the entire term, even though the rate may average less than 10 per cent per annum for the entire term of the loan. (Brief, p. 6.)

But respondent failed to advise this Court that on rehearing of the same case, on June 18, 1930, the Supreme Court of Texas, after retaining the motion for rehearing more than four years, handed down a new opinion, superseding the opinion of the Commission upon which respondent now relies, and applying a different principle in holding the contract to be usurious. *Shropshire v. Commerce Farm Credit Co.*, 120 Texas 400, 412, 30 S. W. (2d) 282, 286. In the concluding paragraph of its opinion, the State Supreme Court said:

"This opinion will supersede that heretofore delivered by the Commission."

Upon such rehearing in the Shropshire case, the Supreme Court held that the "principle controlling the decision of the question of usury" was whether the total compensation payable for the use of the principal debt will produce a sum "greater than the original debt would produce at 10 per cent per annum for the time the payor of the note had the use of the money." (120 Tex. 400, 409; 30 S. W. 285.)

II.

Dallas Trust & Savings Bank v. Brashear.

Respondent cites and quotes from the opinions in the case of *Dallas Trust & Savings Bank v. Bra-*

shear, 39 S. W. (2d) 148, 65 S. W. (2d) 288. That case is not in point because the loan contract there involved contained an "acceleration" clause which entitled the creditor to shorten the term in case of default and thereby to exact a greater rate than 10 per cent per annum "for the time the payor of the note had the use of the money." These "acceleration clause" cases are distinguished in the Petition, pp. 10-12.

III.

Commerce Trust Company v. Ramp.

Commerce Trust Co. v. Ramp, 116 S. W. (2d) 114; 138 S. W. (2d) 533, is cited by respondent. This is another case where there was an acceleration clause and where by resort to that clause the creditor had the right to create a new and shortened term, rendering the contract usurious for that term.

Respondent states that there is an acceleration clause in the present case without any saving clause. (Brief, p. 9.) The instant contract contains a saving clause (R., top p. 27), which, under a holding of the Supreme Court of Texas, prevents the acceleration clause from making the contract usurious. By this saving clause the interest is limited to the interest that is "accrued." *Robertson v. Connecticut Life Ins. Co.*, 134 Tex. 588, 600, 137 S. W. (2d) 760, 766. The acceleration clause is not involved in this case. (Petition, p. 11.)

Respondent asserts that, following petitioner's argument, the parties in this case could have con-

tracted that the debtor should pay all of the interest for the entire 10-year term (amounting to $3800.00 per year, or a total of $38,000.00) one year after date, leaving the entire principal to be paid at the end of the 10-year term, December 2, 1932, and that such a contract would not have been usurious. Petitioner has submitted no argument that would support the contract involved in this illustration. The illustration is inapplicable because in the present case the amount of compensation payable was for the entire 10 years the borrower had the money and was entitled to use the money; whereas, in the case involved in the illustration, the borrower would have the use of the money for only one year.

For ninety years, since the decision of the State Supreme Court in *Mills v. Johnston*, 23 Tex. 308 (quoted from in the Petition, p. 7), the law stated therein, and reaffirmed in the Shropshire case (120 Texas 400, 409, 410, 30 S. W. (2d) 285, bottom 1st column), has been the settled law of Texas.

Respectfully submitted,

E. L. KLETT,
CHARLES L. BLACK,
Counsel for Petitioner.